1998

State of Utah v. Stuart Earl Johnsen : Brief of Appellant

Utah Court of Appeals

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 IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. STUART EARL JOHNSON, Defendant/Appellant.	Case No. 980073-CA Priority No. 2

BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT JUDICIAL COURT, UTAH COUNTY, STATE OF UTAH, BEFORE THE HONORABLE GUY R. BURNINGHAM, FROM THE ENTRY OF A CONDITIONAL PLEA TO POSSESSION OF MARIJUANA IN A DRUG FREE ZONE, A THIRD DEGREE FELONY, AFTER THE DENIAL OF APPELLANT'S MOTION TO SUPPRESS THE EVIDENCE

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JURISDICTION OF THE UTAH SUPREME COURT

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated Section 78-2a-3(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the trial court erred in its denial of Johnson's motion to suppress evidence and in finding the warrantless search of the house to be justified by "exigent circumstances?" "The factual findings of a trial court that underlie its decision to grant or deny a motion to suppress will not be disturbed on appeal unless clearly erroneous. The trial court's 'legal conclusions are reviewed for correctness, with a measure of discretion given to the trial judge's application of the legal standard to the facts.'" State v. Wells, 928 P.2d 386, 388 (Utah App. 1996) (citations omitted).

This issue was preserved in a pre-trial motion and at a suppression hearing (R. 22-39, 57-74).

CONTROLLING STATUTORY PROVISIONS

United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized.

Utah Constitution, Article I, section 14

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath and affirmation particularly describing the place to be searched, and the person or thing to be seized.

STATEMENT OF THE CASE

A. Nature of the Case

Stuart Earl Johnson appeals from the judgment, sentence and order of Probation and a year in the Utah County Jail by the Honorable Guy R. Burningham, Fourth District Court, on December 10, 1997, after the denial of Johnson's Motion to Suppress Evidence and the entry of a conditional plea to Possession of Marijuana in a Drug Free Zone, a Third Degree Felony.

B. Trial Court Proceedings and Disposition

Johnson was charged by information filed on or about November 22, 1996, with two violations of the controlled substances act (R. 2).

After a preliminary hearing (R. 11) and the entry of "not guilty" pleas at arraignment (R. 16), Johnson filed a Motion to Suppress the Evidence under the Fourth Amendment to the United States and Article I, Section 14 of the Utah Constitution (R. 22-39). Johnson argued that the warrantless search of the house wherein he was found was without his consent and was not justified by "exigent circumstances" (Id.).

On July 1, 1997, a suppression hearing was conducted before Judge Burningham and the trial court subsequently denied Johnson's Motion to Suppress (R. 48-49, 57-74).

Johnson entered a conditional plea of "guilty" to Possession of Marijuana in a Drug Free Zone, a third degree felony and he was sentenced to thirty-six months probation and 14 days in the Utah County Jail Work Diversion Program (R. 99-104, 119-20). On February 5, 1998, Johnson filed a Stipulated Motion to Extend Time to Appeal; and he subsequently filed a Notice of Appeal with the Fourth District Court on February 6, 1998, challenging the trial court's denial of his motion to suppress(R. 115-117, 125-26).

STATEMENT OF RELEVANT FACTS

On November 16, 1996 Provo City police officers were dispatched to 980 North 646 West in Provo because a neighbor was complaining about an odor of marijuana coming from the downstairs apartment (Supp. Hrg. at 5-6).[1] The building was either a four-plex or duplex with upstairs and downstairs apartments with shared walls (Supp. Hrg. at 15).

Officers Eric Knudsen and Trent Halladay arrived at the apartment complex at approximately 11:30 p.m. and spoke with the complainants, Troy Guevara and Jason Campbell, just outside the apartment complex (Supp. Hrg. at 6-7, 22). Guevara and Campbell again indicated to the officers that they could detect an odor of burnt marijuana coming from the downstairs apartment and that they didn't believe the renter or owner of the apartment was present and that they didn't know or recognize any of the people in the apartment (Supp. Hrg. at 7, 22, 29). Knudsen did not ask the complainants about their knowledge of the apartments owner/occupants (Supp. Hrg. at 17).

Present with Guevara and Campbell, according to Knudsen, was J.C. Thomas Anderson, whom Guevara and Campbell said had been in the apartment (Supp. Hrg. at 7-8). Officer Eric Knudsen "spoke with [Anderson] briefly for a second" and was told upon

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[1]The transcript of the suppression hearing is found at R. 57-74.

questioning that Anderson did not live in the downstairs apartment but was just visiting (Supp. Hrg. at 8). Knudsen did not make inquiry with Anderson as to the apartment's owner (Supp. Hrg. at 16). Knudsen did not personally know if Anderson had been in the downstairs apartment (Id.). Halliday could not recall participating in any conversation with Anderson (Supp. Hrg. at 29).

Knudsen then looked down the stairwell to the downstairs apartment and "saw the door was slightly open" (Supp. Hrg. at 8). As Knudsen then walked down the stairs, someone from the inside shut the door (Supp. Hrg. at 9). At this point Knudsen could not detect any noticeable odors (although on cross-examination he indicated he could smell marijuana coming from Anderson) (Supp. Hrg. at 9, 17). Halliday also indicated that he only smelled marijuana "when we approached the house" and after the door was opened (Supp. Hrg. at 28).

Knudsen knocked several times on the door with no answer although he could hear "rustling around" (Supp. Hrg. at 9, 12, 20). Knudsen then checked the door handle to see if it was locked and finding it unlocked he opened the door approximately a few feet (Supp. Hrg. at 9-10). Knudsen did not have permission to enter the apartment (Supp. Hrg. at 19).[2]

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[2]Halliday testified that he and Knudsen went down the stairwell and knocked on the door which was opened by a young man (Supp. Hrg. at 23). Halliday testified he was behind Knudsen

Knudsen testified that the room appeared dark from where he stood in the doorway; and that he did not advance any further into the home but simply announced his identity and that he wished to speak with an occupant (Supp. Hrg. at 10). Knudsen (and Halliday) testified that "immediately after opening" the door he could smell an odor of marijuana (Supp. Hrg. at 10, 24). The officers testified that they saw no weapons or people in the apartment (Supp. Hrg. at 20, 31).

Upon opening the door and identifying himself, Knudsen (and Halliday) were informed by another officer that some individuals were running from the back of the building and that officer then gave foot pursuit (Supp. Hrg. at 10, 19-20, 30).

Eventually Knudsen left the apartment and apprehended two individuals (Supp. Hrg. at 10). Approximately 7-8 individuals were apprehended by the two officers (Supp. Hrg. at 11, 24). These individuals "were all brought back to the outside of the apartment and sat down on the north curb" (Supp. Hrg. at 11). When asked the individuals informed the officers that none of them lived in the downstairs apartment (Supp. Hrg. at 11, 24). In addition, the individuals either did not know--or would not tell--who owned the apartment (Id.). Approximately fifteen minutes elapsed between the time Knudsen entered the apartment

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(Id.). Halliday testified that Knudsen asked the individual whose apartment it was and "the gentleman couldn't give us an answer" (Supp. Hrg. at 24).

and the officers questioning of the individuals (Id.).

Knudsen then had officers John (or Juanda) and Halliday search the apartment because he "couldn't find out who the owner was [and he] wasn't sure if there was still someone in the apartment" (Supp. Hrg. at 12). Knudsen said he did this out of concern for "officer safety" (Id.). Knudsen testified he was concerned with a possible burglary/trespass upon speaking with the complainants (Supp. Hrg. at 12,33), however, Halliday testified that he did not suspect a trespass until the individuals were apprehended and questioned (Supp. Hrg. at 30, 32).

Halliday and John searched the apartment and located Johnson locked in a bathroom (Supp. Hrg. at 25). In addition, a marijuana bong was discovered in a bedroom (Id). The officers then took Johnson outside and Knudsen then left and obtained a search warrant and executed it on the premises (Supp. Hrg. at 21, 26). During the execution of the warrant, the officers located marijuana in the apartment.

After the denial of Johnson's motion to suppress, he subsequently entered a conditional plea of "guilty" to Possession of marijuana in a Drug Free Zone with a prior conviction, a Third Degree Felony; and he was sentenced to three years probation and 14 days in the Utah County Jail Work Diversion Program.

In a supplemental report filed with the Utah County

Attorney's office, Knudsen attached a note to the prosecutor which said: "Sorry for the confusion on the report. I was not involved in this case as much as I should have been. Other officers were assisting also and therefore some of the decisions made may have been questionable" (Supp. Hrg. at 34-35). However, Knudsen clarified on redirect examination that the confusion only involved individuals at the scene (Supp. Hrg. at 36).

SUMMARY OF ARGUMENT

Warrantless searches of homes are violative of Article I, Section 14 of the Utah Constitution and the Fourth Amendment to the United States Constitution unless conducted pursuant to a recognized exception to the warrant requirement. In this case, the trial court concluded that the warrantless searches of Johnson's residence were justified under an "exigent circumstances" theory. Johnson asserts that the trial court's decision is erroneous because no exigent circumstances were present at the time of the officer opening the door to the private residence nor at the time the warrantless "security sweep" search was made. It was necessary for the protection of the police or the preservation of the evidence or to prevent the escape of suspects.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS DENIAL OF JOHNSON'S MOTION TO SUPPRESS AND IN ITS CONCLUSION THAT THE WARRANTLESS SEARCH OF HISRESIDENCE WAS REASONABLE

Both Article I, Section 14 of the Utah Constitution and the Fourth Amendment to the United States Constitution protect individuals from unreasonable searches and seizures, particularly in one's home. Indeed, " '[p]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' " State v. Beavers, 859 P.2d 9, 13, (Utah App. 1993) (quoting United States v. United States District Court, 407 U.S. 297, 313, (1972)). Moreover, "warrantless searches and seizures within a home or other private premises are per se unreasonable absent exigent circumstances," Beavers, 859 P.2d at 13. (citing Katz v. United States, 389 U.S. 347, 357, (1967); and "there must be a showing by those who seek the exemption ... that the exigencies of the situation made [the search] imperative." State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). Furthermore, "[t]he State bears the particulary heavy burden of proving the warrantless entry into a home falls within the exigent circumstances exception to the warrant requirement." Beavers, 859 P.2d at 13.

In the present case, law enforcement officers opened the door to Johnsons' residence absent consent and ordered that

someone come to the door to respond to questioning (Supp. Hrg. at 9-10, 19). A warrantless "security sweep" of Johnson's home was subsequently conducted for expressed officer safety reasons, at which time the incriminating material was observed (Supp. Hrg. at 12, 25). Clearly these actions are subject to Fourth Amendment protections.

Johnson asserts that the trial court erred in concluding that the State had sustained its burden of establishing that the circumstances surrounding these searches of Johnson's residence constitute an exception to the warrant requirement under an "exigent circumstances" theory and that the officers had probable cause and reasonable suspicion (R. 79-81). Johnson particularly challenges the trial court's conclusion that the warrantless "security sweep" of the apartment, which resulted in the discovery of the marijuana and which was conducted long-after the other suspects had been apprehended--was justified.

A. The warrantless search of Johnson's residence was not justified by "exigent circumstances.

A warrantless search or seizure within a residence is "constitutionally permissible where probable cause and exigent circumstances are proven." State v. Yoder, 935 P.2d 534, 540 (Utah App. 1997). Such an exception exists to prevent physical harm to law enforcement personnel or others, the destruction of evidence, or the escape of the suspect. Yoder, 935 P.2d at 540 (citing Beavers, 859 P.2d at 13). However, "exigent

circumstances exist 'only when the inevitable delay incident to obtaining a warrant must give way to an urgent need for immediate action.' " Wells, 928 P.2d at 389 (citation omitted) (quoting United States v. Satterfield, 743 F.2d 827, 844 (11th Cir. 1984)).

In Beavers, 859 P.2d at 9, this Court concluded that "[e]xigent circumstances are those 'that would cause a reasonable person to believe that entry. . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." (citing United States v. McConney, 728 F.2d 1195, 1199 (9th Cir. 1984), *cert. denied*, 469 U.S. 824 (1984)). However, "the mere possibility that a suspect may have a weapon or that evidence might be destroyed in insufficient." Wells, 928 P.2d at 389 (citations omitted). Additionally, "[a]ny legitimate concern which police claim for their safety must of necessity arise before the challenged entry," and "police cannot create the exigency in order to justify a warrantless entry." Beavers, at 18 (citing "United States v. Munoz-Guerra, 788 F.2d 297, 297-98 (5th Cir. 1986)(where agents knew that their knocking would create a need for a security search, exigent circumstances were of their own making and the search was improper)").

The facts of the Beavers case are particularly relevant

here, where the operation of the same exception is at issue. In Beavers, officers responded to a call from the manager of an apartment regarding a possible assault in progress. Upon arrival to the scene, the manager added that he had seen two males enter the suspect apartment earlier, but that he did not believe that the renter was home. Beavers, 859 P.2d at 10. The officers reportedly could hear raised voices coming from within the apartment, and they further noted that the door latch had been broken and that the door was slightly opened. Id. The officers positioned themselves outside the apartment and listened to the progressing argument, which appeared to involve the value of coats. Id. at 11. The facts of the case further indicate that a large number of coats had been stolen from area stores earlier that day. Id. at 10.

Moments later, one of the individuals inside the apartment attempted to leave and stepped through the doorway out into the hall carrying a new coat. Upon seeing the officers, the suspect stepped back across the threshold into the apartment. One officer reached through the open doorway to grab the suspect before he could retreat further. Id. at 11. At that point the officers observed several other individuals within the room. As the information received from the manager indicated that the renter was Caucasian and the suspects were clearly African-American, the officers did not believe that the renter was

present. Id. The officers further observed one of the suspects fumbling in a pile of clothes while the others fled from view. In light of the facts known to them and out of an additional concern for officer safety, the officers drew their weapons and proceeded to enter the apartment and seize all individuals present within. Beavers, 859 P.2d at 11. Upon searching the apartment, the coats which had been taken earlier in the day were located and recovered. The Defendant appealed his ensuing convictions of burglary and theft. Id. at 10.

Upon consideration of the warrantless search in Beavers, this Court reversed the defendant's conviction at trial. The Court weighed all information available to the officers at the time the warrantless entry was made, including: the tip from the manager of a crime (assualt) in progress, the information that the manager did not believe that the Caucasian renter of the suspect apartment was home and the later confirmation that all occupants were in fact African American, the fact that the latch to the apartment door was broken from a possible forced entry, the knowledge that a burglary and theft involving coats had been committed earlier that day, the argument the officers overheard regarding the value of coats, and the fears the officers had regarding their own safety. Taking all those factors into consideration, the Court nevertheless delined to uphold the warrantless search, stating: "[T]he undisputed factual findings

indicate that Officer Humphries reached accross the threshold of apartment 4B to seize the retreating Davis. Thus, the seizure occurred within the constitutionally protected confines of a private residence, where citizens enjoy a heightened expectation of privacy." Beavers, 859 P.2d at 13.

The facts of Beavers closely parallel the facts of the present case. In both situations, law enforcement personnel responded to calls from residents in apartment buildings regarding suspected criminal activity in progress within those buildings. In both cases the officers noted some suspicious activity at the scene. In Beavers, the officers observed a broken door latch, indicating a possible break-in, and they overheard an argument over the value of coats which were suspected to be stolen property. In the present case, Officer Knutzen noted an individual outside the suspect apartment who smelled of burnt marijuana (Supp. Hrg. at 17). This person was not believed to be a resident of the home (Supp. Hrg. at 8). In both cases, the informants relayed to law enforcement officers that the renter of the respective apartment was not believed to be home (Supp. Hrg. at 7, 22, 29). Finally, in both cases the officers eventually entered the apartments, using their suspicions of criminal activity and officer safety concerns to support their entry (Supp. Hrg. at 12, 33). Johnson asserts that the present action is so similar to Beavers that the same result

should be reached--namely that the actions of law enforcement officers should be held in violation of his constitutional rights.

In a related case, State v. Wells, 928 P.2d at 389 (citation omitted) this Court concluded that the trial court erred in failing to suppress cocaine which was found in the lining of defendant's jacket after officers had executed arrest warrants on the defendant and handcuffed both suspects at the home. In its decision this Court noted "[t]he record reflects that both suspects were handcuffed and in custody when the cocaine was seized... The officers had controlled the initially chaotic situation by the time they searched the jacket. Therefore, the initial exigencies which had dissipated by the time of the search, could not have justified the cocaine seizure." Id. at 389.

Similar to the situation in Wells the record in this case reflects that the officers had controlled any initially chaotic situation when they apprehended the seven individuals who fled from the apartment (Supp. Hrg. at 11, 24). They were secured safely outside the apartment and the officers had observed no furtive movements or weapons of any kind. Therefore any "initial exigencies" had dissipated by the time of the warrantless "security sweep" and could not have justified the warrantless search.

Using the first prong of the test outlined in Beavers , the trial court determined that the search in question was justified based on exigent circumstances. In support of its decision the trial court cited the actions of the individuals apprehended leaving the scene and their refusal to identify the owner or occupant or otherwise explain their actions (R. 80, 82). The trial court also relied on a concern for officer safety because of potential threats from unknown persons who may have still been inside the apartment, and a need to stop what appeared be a trespass or burglary that was taking place (R. 80).

Exigent circumstances have been clearly defined by the Utah Court of Appeals as:

> [T]hose "that would cause a reasonable person to believe that entry... Was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." United States v. McConney, 728 F.2d 1195, 1199 (9th Cir.), cert. denied, 469 U.S. 824 (1984). "The need for an immediate search must be apparent to the police, and so strong as to outweigh the important protection of individual rights provided by the warrant requirement." U.S. v. Robertson, 606 F.2d 853, 859 (9th Cir. 1979).

Beavers, 859 P.2d at 17.

Under the applicable legal analysis, it is clear that none of the circumstances of the instant case qualify as exigent circumstances.

1. An officer's suspicion of drugs does not in and of itself create an exigency.

This Court considered the application of the exigent circumstances doctrine to the suspected use of drugs in State v. South, 885 P.2d 795 (Utah App. 1994), remanded on other grounds, 924 P.2d 354 (Utah 1996). In South, the officer responded to a call of a suspected cellular phone theft. He met the defendant at the door and smelled burnt marijuana coming from his clothing and from inside the home. Id. at 797. The officer left to secure a warrant to search the person of defendant and returned with other officers to the home to serve the warrant. In executing the search of the defendant, the officers also searched the residence and discovered controlled substances and paraphernalia. Id.

At trial, the defendant sought suppression of the evidence, arguing that the officers exceeded the scope of the warrant by searching his residence. The trial court upheld the search, ruling that although the search warrant was defective, the officers had probable cause to conduct a search of the residence based on the plain smell doctrine. Id.

This Court reversed, holding that, although the plain smell doctrine did supply the officer with probable cause, a finding of both probable cause *and* exigent circumstances was required to justify a warrantless search. South, 885 P.2d at 799. Further, the Court rejected the argument presented by the State that the

smell of burning marijuana automatically provided officers with exigent circumstances to justify the warrantless search. "[A] home will still be there when officers return with a search warrant. Further, officers can secure a home while a search warrant is obtained... Therefore, the fact that the marijuana may be 'removed, hidden, or destroyed is not, in and of itself, an exigent circumstance.'" South, 885 P.2d at 800 (quoting State v. Dorson, 615 P.2d 740, 746 (Haw. 1980)).

The South Court responded appropriately to the State's attempt to justify the search under the exigent circumstances exception:

> If we were to hold that the mere possibility that evidence maybe destroyed constitutes an exigent circumstance, we would essentially undermine the exigent circumstance requirement since it is possible that most forms of evidence can be destroyed before officers return with a warrant. *The State's concern that marijuana may be hidden or disposed of before officers obtain a warrant is outweighed by the concern that a warrantless search would violate the heightened expectation of privacy in a private home.*

Id (emphasis added).

Similarly, in the present case the alleged presence of marijuana should not be considered to be a per se exigent circumstance. Under the present facts, Knudsen and Halliday really did not personally observe the odor of marijuana until he opened the door to the apartment without consent (Supp. Hrg. at 9, 17, 28). A tip of suspected marijuana use, absent any investigatory corroboration, ought not be considered to be an

emergency situation which would require the application of the exigent circumstances exception. The Fourth Amendment would mean nothing if law enforcement personnel were allowed to invade the privacy of a home for nothing more.

Furthermore, as the South Court noted, a home cannot be quickly and easily driven away, as can a vehicle--particularly where as in this case enough officers are present to both control the scene and secure a warrant. The same risk of the loss of evidence simply does not exist in this situation. Therefore, the policy behind the exigent circumstances exception does not support a search of a residence under the instant facts, although that policy might well permit a warrantless search if a vehicle had been involved rather than a residence. Moreover, a telephonic warrant could have been sought in this case to perform a search efficiently and constitutionally. However, this procedure was simply not completed.

2. No threat of officer safety created a situation which could justify the warrantless entry into Johnson's home.

The trial court concluded that officers were authorized to enter Johnson's residence to conduct a safety sweep for officer safety reasons (R. 80). Under direct examination, Officer Knudsen testified that the walk-through of Johnson's apartment was ordered out of concern for officer safety (Supp. Hrg. at 12). In considering the issue of officer safety, the Beavers Court

stated that:

> Exigent circumstances which would justify a warrantless entry 'are those in which a *substantial risk of harm* to the persons involved or to the law enforcement process would arise if the police were to delay a search until a warrant could be obtained... *There must be no practical way to avoid these risks* and yet follow the Constitution's mandate of detached judicial supervision of such intrusions.'

Beavers, 859 P.2d at 18 (quoting United States v. Robertson, 606 F.2d 853, 859 (9th Cir. 1979)(emphasis added).

In its analysis, the Court went on to unequivocally state that "[a]ny legitimate concern which police claim for their safety must of necessity arise *before* the challenged entry... Moreover, *police cannot create the exigency* in order to justify a warrantless entry." Id. (emphasis added).

In the present case, there was certainly no articulable concern for officer safety preceeding the warrantless entry. The pronounced rationale for performing the sweep was to check for additional suspects after the first seven occupants fled through the rear window. However, it should be noted that this scenario did not occur until *after* the illegal entry of Knudsen and Halliday by opening the door without consent. Moreover, when Knudsen and Halliday first entered the apartment they saw no one and no weapons (Supp. Hrg. at 20, 31). Any arguable exigency at the point of the suspect's flight was created solely by law

enforcement.[3] Prior to Officer Knutzen's entry, the facts known to the officers were: drugs were allegedly being used on the suspect premises, the renter was suspicioned to be at work, and an unknown individual who may or may not have been in the apartment smelled of marijuana (Supp. Hrg. at 7-9, 16-17, 22, 29). These circumstances did not give rise to any fear for the safety of the officers or the safety of any citizen bystander. The efforts of law enforcement officers would not have been endangered or frustrated by securing a warrant to effect lawful entry into the home.

Furthermore, regardless of the cause of the initial exigency, the officers in this case had controlled any initially chaotic situation when they apprehended the seven individuals who fled from the apartment. The suspects were secured safely outside the apartment and the officers had observed no furtive movements or weapons of any kind (Supp. Hrg. at 11, 20, 24, 31). Therefore any "initial exigencies" had dissipated by the time of the warrantless "security sweep" and could not have justified the warrantless search. See Wells, 928 P.2d at 389. Again, the officers could have easily secured the home, as it appears they had, and secure the required warrant without violating Johnson's

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[3]Johnson has previously marshaled the evidence in the Statement of Facts but will do so explicitly in the next section as it relates to the issue of whether police created any exigencies in this case.

Fourth Amendment rights.

3. Any emergency or risk of flight by the suspects was created by the officer's illegal entry into the home.

The trial court's conclusion that the risk of flight of any occupants remaining in the apartment justified the warrantless entry and search of Johnson's home was clearly erroneous. Law enforcement officers cannot create the exigency upon which they rely to qualify for an exception to the warrant requirement. In so holding the Beavers Court cited to United States v. Munoz-Guerra, 788 F.2d 295 (5th Cir. 1986). The Fifth Circuit there determined that the agents created their own exigency by announcing their presence to the suspects. For that reason, the warrantless entry and search that followed was improper. Id. at 297-98.

The analysis there is parallel to the facts of the instant case. Here, the trial court concluded that Officer Knudsen's "[o]pening the door to the apartment, under the totality of the facts, did not cause the people to flee out the back of the apartment as evidenced by someone closing the door as the officer approached followed by movement and rustling and the almost simultaneous departure of 8 people out the back as the officer was calling out in front (R. 82).

However, Halliday testified that an individual opened the door when he and Knudsen knocked on the apartment door (Supp. Hrg. at 24). Moreover, Johnson asserts that Knudsen's testimony

(which is supported by Halliday's testimony on this point) indicates that his entry and subsequent verbal identification was the likely cause of the exigency--the fleeing of the apprehended individuals. Both officers testified that upon opening the door and following Knudsen's identification, they were informed that some individuals were running from the back of the building (Supp. Hrg. at 10, 19-20, 30). This assertion is also supported by Knudsen's testimony at preliminary hearing:

> Q. Now, you also stated on direct that you knocked on the door. The door was completely closed; is that correct?
> A. It was initially open when I looked down there. Then when I walked down the hallway it closed.
> Q. But the door was closed when you --
> A. When I got there it was closed, yeah.
> Q. When you say you checked the door, how did you check it? Did you rattle the handle or did you knock; what was it that you did specifically?
> A. I knocked for quite a while. I could hear some rustling going around. Then I just twisted the door handle to see if it was unlocked.
> Q. So after you knocked you didn't hear anyone say, "Come in," or anything like that, right?
> A. (Inaudible).
> Q. How far did you open the door?
> A. I just pushed it open. It could have went a couple feet open.
> Q. And you stated upon direct that you smelled marijuana after you pushed the door open; is that correct?
> A. Yeah, immediately. Yes.
> Q. And you didn't smell marijuana before the time you opened the door, did you?
> A. I smelled it on the other individual J.C. Thomas.
> Q. But you didn't have any personal knowledge that he had been in the apartment, did you?
> A. I didn't.
> Q. You indicate another officer informed you that some people were running out of the window of the apartment; is that correct?
> A. That's correct.
> Q. You got on the radio, or how was it that you were

informed of that?
A. I don't recall. It wasn't on the radio. I think somebody had yelled around, "They're running out the back window."
Q. That was after you had opened the door and identified your presence; is that correct?
A. That's correct.

(Prelim. Tr. at 18-19).

It is clear--based on Knudsen's own testimony--that none of the occupants within the apartment fled until *after* the officers had opened the door to the apartment. Hence, similar to the officers in United States v. Munoz-Guerra, (cited with approval in Beavers) the need to pursue the suspects and search the home for any hiding individuals arose solely from the officer's actions of announcing their presence and the improper, premature entry into the home. The officers in this case had every opportunity prior to the challenged entry to remain on guard *outside* the dwelling while they complied with the warrant requirement. Indeed, the officers did just that after the improper entry was made. The fact that the officers were later able to quickly secure a warrant clearly demonstrates that this avenue was both reasonable and available to them. However, the officers chose instead to enter Johnson's private home without a warrant and in violation of the Constitution. This type of "shoot from the hip" approach is improper and ought not be sanctioned by this Court.

4. Suspicions of a possible burglary or trespass in progress did not create an exigent circumstance.

Finally, the trial court justified the entry at issue by concluding that the officer's suspicions of burglary and/or trespass rose to the level of an exigent circumstance (R. 80-82). The record in this case refers to the individual identified as "J.C." outside the suspect residence and the time the officers questioned the informants. Officer Knudsen spoke with J.C. Anderson briefly and determined that he did not reside in the apartment (Supp. Hrg. at 8). The officer also noted that J.C. smelled of burnt marijuana (Supp. Hrg. at 17). However, Knudsen later acknowledged that he had no real knowledge that Anderson had ever been in the apartment nor did Knudsen inquire of Anderson as to the apartment's owner (Supp. Hrg. at 16). Therefore, at this stage in the scenario, any suspicions of burglary or trespass were tenuous at best and solely based upon the complainants assertion that they did not believe the owner was present (Supp. Hrg. at 7, 22, 29).

Furthermore, based on the testimony presented by Officer Knutzen at the Preliminary Hearing, it is clear that the suspicions maintained by law enforcement officers prior to the warrantless entry were directed at the possible marijuana usage, not at a suspected burglary. It was not until *after* the entry, and the attempted flight by the suspects which was directly caused by that entry, that any suspicions regarding a burglary or

trespass were raised.[4] The State ought not be permitted to rely on knowledge that the officers obtained post-entry. Johnson respectfully submits that only the facts known to the officers at the time of the challenged entry, when Knudsen opened the door without consent and announced his presence and demand to speak with someone, should be considered. Testimony offered at the Preliminary Hearing clearly demonstrates that, at the time of the

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[4]During Direct Examination regarding the initial contact between law enforcement and the informants, the Officer responded to the following questioning:

> Q. ... I asked you about a burglary. Did the persons outside tell you that the people in the apartment did not live there, or what did they say about that?
>
> A. They said they believed that the individual who they believed lived there was at work, and didn't know any of the people downstairs. The said– they brought up the initial marijuana usage at that time. So I was just thinking it was suspicious that these individuals were in the house at this time.
>
> Q. Did you suspect that the people inside the house were not connected with the home?
>
> A. *I was unsure at the time. Didn't know exactly what was going on downstairs.*

(R. 128, p. 6)(emphasis added).

In further Direct, Officer Knutzen described the pursuit and detention of the suspects following the entry to the residence:

> Q. After you caught those seven people did you determine if any of them lived in the apartment?
>
> A. I did. I brought them back to the residence, sat them down on the sidewalk, and began to question them as to who lived in the apartment.
>
> Q. Did any of them live there?
>
> A. They stated, "No." When I asked them who lived in the apartment and asked for any names, they all motioned with their bodies that they didn't know.
>
> Q. What did you do next?
>
> A. *I was concerned about a possible burglary <u>at that time</u>,* because nobody was claiming they knew who lived in the apartment.

(R. 128, p. 9)(emphasis added).

entry, the officer suspected possible marijuana usage, not a possible burglary. The suspicion of burglary and/or trespass did not arise until *after* the warrantless entry gave rise to the foot pursuit, and the subsequent detention and questioning of the suspects.

Moreover, even if the officers in this case did suspect a burglary before the first warantless entry, the search would still not be justified. Recall that in Beavers the officers had in their possession all of the following information: the tip from the manager of a crime (assualt) in progress, the information that the manager did not believe that the Caucasian renter of the suspect apartment was home and the later confirmation that all occupants were in fact African American, the fact that the latch to the apartment door was broken from a possible forced entry, the knowledge that a burglary and theft involving coats had been committed earlier that day, the argument the officers overheard regarding the value of coats, and the fears the officers had regarding their own safety. All of this was insufficient to justify the warrantless entry that occurred.

In this case, contrary to Beavers, there was no broken latch or any signs of forced entry or any explicit suggestion of a burglary in progress. Unlike the officers in Beavers who had definite reason for knowing that the individuals in the apartment were not the owners or residents, in this case there was only the

potential that there may have been someone remaining in the apartment who did not reside there. Clearly, if the circumstances in Beavers was insufficient to justify a warrantless entry, then the circumstances surrounding the entry into Johnson's residence require the same conclusion- that the warrantless entry and subsequent search was not justified by exigent circumstances.

B. The Utah Constitution provides additional protections against warrantless searches above the threshold provided by the United States Constitution.

Although the language of Article I, Section 14 of the Utah Constitution mirrors its federal counterpart, in application its effect may be markedly different. The Utah Supreme Court so noted in State v. Larocco, 794 P.2d 460 (Utah 1990). Citing its own language from and earlier decision, the Larocco Court held that "'choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given to the Fourth Amendment by the federal courts.'" Id. at 465 (quoting State v. Watts, 750 P.2d 1219, 1221 at n. 8 (Utah 1988)).

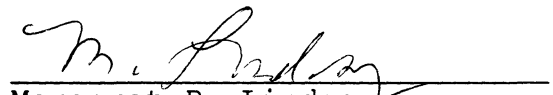
Using that rationale, the Utah Supreme Court elected to set a higher state standard for applying the automobile exception to the warrant requirement contained within the State Constitution. Defendant submits that the federal courts' interpretation of the

exigent circumstances exception, much like the interpretation of the automobile exception, has the potential to vacillate and not provide the consistent protection necessary. The citizens of Utah should be protected from arbitrary actions of law enforcement that are evidenced by the facts of this case. Accordingly, the present search should be overturned under both the federal and the state constitutions.

CONCLUSION AND PRECISE RELIEF SOUGHT

Johnson respectfully asks that this Court conclude that the trial court erred in denying his motion to suppress and in concluding that the warrantless entry and subsequent search of his residence were justified under an "exigent circumstances" theory. Accordingly, Johnson asks that this Court reverse his conviction and remand the matter to the district court with directions that Johnson's plea may be withdrawn and with orders to suppress the illegally obtained evidence.

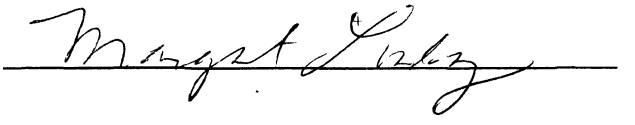
RESPECTFULLY SUBMITTED this 23 day of September, 1998.



Margaret P. Lindsay
Counsel for Johnson

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 23 day of September, 1998.



ADDENDA

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IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff,	:	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
vs.	:	
STUART EARL JOHNSEN,	:	**Case No. 961401667 FS**
Defendant(s).	:	**Judge Guy R. Burningham**

This matter came before the Court, the Honorable Guy R. Burningham presiding, on the 1st day of July, 1997. The Plaintiff was represented by Deputy Utah County Attorney James R. Taylor. The Defendant was present, in person, and represented by Christine Sagendorf. The Court heard evidence on the Defendant's Motion to Suppress. Being advised in the premises, the Court makes and enters the following:

FINDINGS OF FACT

1. On November 16, 1997 police officers were dispatched to 980 North 646 West in Provo because a neighbor was complaining about marijuana being used in an adjoining apartment.

2. Officers arrived, just before midnight, and spoke on the street outside the apartment to two men, Troy Guevara and Jason Campbell, who

stated that they lived upstairs from the complained-of apartment and could smell the odor of burned or burning marijuana coming from the apartment. The men told officers that they didn't believe the renter or owner of the apartment was present but was at work and that they didn't know or recognize any of the people in the apartment. They pointed to a third person and told officers that "he's one of them".

3. Officers spoke to the third man, J.C. Thomas Anderson. The officer who spoke to Anderson, Officer Knutzen, could detect an odor of marijuana coming from Anderson. Anderson said he didn't live in the apartment and was just visiting.

4. Officer Knutzen, at that point, reasonably suspected that a burglary or trespass might be taking place.

5. The officers then approached the suspect apartment which was the basement or downstairs apartment. As the officers started at the top of the stairs to go down to the door they noticed that the front door to the apartment was open one to two feet. As they walked down the stairs, someone from inside shut the door.

6. Officer Knutzen knocked several times on the door. As he knocked and waited, he heard a great deal of rustling and movement inside the apartment. At this point the officer had a heightened suspicion of criminal activity within the apartment. The officer checked the front door to see if it was locked and discovered that it was not locked. He then pushed the door open to approximately the same as it had been when he started down the stairs. The room was dark and nothing was seen or heard by the officer when the door was opened. The

officer called out that he was a police officer and wished to speak to someone. When the door was opened the officer caught a strong smell of burned marijuana. The officers were, at that point, told that people were climbing out of the back window of the apartment and fleeing the scene.

7. Several officers participated for about 10 to 15 minutes chasing and apprehending 7 to 8 people who had climbed out the back window and fled the scene. All were brought back and asked if they lived in the apartment or knew who did. All replied that they did not live there and none could identify the owner or tenant.

8. Opening the door to the apartment, under the totality of the facts, did not cause the people to flee out the back of the apartment as evidenced by someone closing the door as the officer approached followed by movement and rustling and the almost simultaneous departure of 8 people out the back as the officer was calling out in front.

9. Before conducting a protective sweep of the apartment, officers had determined, (1) that the neighbors had detected the odor of marijuana and knew the tenant to not be home; (2) that a person identified by the neighbors as one of the people who had been in the apartment did smell of burned marijuana; (3) that someone had closed the door of the apartment as the officers approached on the stairs to speak with the people in the apartment; (4) that an odor of marijuana was emanating from the apartment's door when it was opened by the officer; (5) that at least 7 people fled out the back window as officers were attempting to speak with them at the front door; and, (6) that the 7

people who fled, when caught and brought back to the scene did not live in the apartment and could not identify who the tenant was.

10. Out of concern for officer safety for fear that an additional person or persons might still be inside the apartment and also because the officers felt that any additional persons inside the apartment did not belong there and were committing a trespass or burglary, two officers walked through the apartment to check for additional suspects as a "security sweep".

11. During the sweep officers found the defendant hiding in a locked bathroom. Officers also saw drug paraphernalia which was not seized but merely described in an affidavit in support of a search warrant which was obtained and executed, resulting in the seizure of the evidence sought to be suppressed by this motion.

From the forgoing Findings of Fact, the Court makes and enters the following:

CONCLUSIONS OF LAW

1. Officers had a reasonable suspicion that the crimes of trespass, burglary and/or use of controlled substances were being committed in the apartment after hearing the statements of the complaining citizens and speaking to the third man identified as one of the group in the apartment.

2. Officers had probable cause to believe that criminal conduct was occurring within the apartment and that important evidence would be found in the apartment upon considering the statements of the neighbors,

the encounter with the man identified as "one of them", observing the door to the apartment close as the officers descended the stairs, observing the sound of movement and rustling inside the apartment before knocking on the door.

3. The occupants' flight from a rear window of the apartment as officers were attempting to make contact at the front door was virtually simultaneous with the actions of the door opening and calling to occupants by the officer. The flight was not caused by the officer's actions.

4. The actions of the occupants, however, in fleeing the scene and then refusing to identify the owner or occupant or otherwise explain their actions provided exigent circumstances justifying the warrantless entry into the home to determine if any crime was ongoing.

5. The security sweep of the apartment after apprehending the people who fled from the apartment was justified by the probable cause that a crime had been or was occurring within the apartment coupled with exigent circumstances consisting of a legitimate concern for officer safety because of a potential threat from unknown persons who may have

still been inside the apartment and the need to stop what appeared to be a trespass or burglary that was taking place.

DATED this 11 day of August, 1997.

BY THE COURT:

GUY R. BURNINGHAM
DISTRICT JUDGE

APPROVED AS TO FORM:

CHRISTINE SAGENDORF
ATTORNEY FOR DEFENDANT